TITLE 328 FINANCIAL ASSURANCE BOARD

#02-204(FAB)

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM requested public comment from December 1, 2003, through January 8, 2004, on IDEM's draft rule language. IDEM received comments from the following parties:

Christopher J. Braun, General Counsel to the Indiana Petroleum Marketers and Convenience Store Association (PSRB)
Maggie McShane, Executive Director, Indiana Petroleum Council (IPC)
Catherine Gibbs, Lee & Ryan (L & R)

Following is a summary of the comments received and IDEM's responses thereto:

Comment: The IPCA certainly appreciates the extensive amount of time and effort invested by representatives from the ELTF, IDEM, UST owners and the environmental consulting community during the past several months to develop a consensus on various amendments to the ELTF's rules. The IPCA supports the overall goal of this rulemaking, which has been to ensure that the monies from the Fund are being wisely spent by the UST owner, environmental consultant and IDEM in undertaking reasonable, cost effective cleanups. The IPCA believes that this goal has been accomplished in this rulemaking in several positive ways: (a) further clarification of the rules to avoid the "open checkbook" approach of UST investigations and cleanups; (b) minimizing the potential for claims and billing excesses by tightening certain rules; (c) more carefully evaluating what constitutes "cost effective" site investigations and cleanups and "reasonable" costs; (d) reducing the amounts of certain reimbursable costs; (e) further integration of RISC in determining an appropriate level of cleanup standards for sites, including a cost benefit analysis of operation and maintenance costs for long-term monitoring of sites; and (f) the prioritization of sites based on the actual environmental risks to human health and the environment.

These changes are certainly needed. Since its high water mark in June 2001 when its balance peaked at more than $87,000,000, the ELTF's balance has rapidly declined, to $68,000,000 in June 2002, $52,000,000 in June 2003 and $37,000,000 as of October 31, 2003. The reasons for this situation are many and are more fully reflected in the article recently published in the IPCA's Fueling Indiana magazine, a copy of which is attached hereto at **Tab 1** and incorporated herein. Moreover, the consolidation within the petroleum marketing industry continues, as the large number of mergers and acquisitions of UST operations has resulted in numerous site investigations and cleanups as part of the transfer of the properties, with the total amount of claims being paid by the ELTF nearly tripling in two years, as they increased from roughly $16,000,000 in 2001 to more than $47,000,000 in 2003. During this same period, the annual revenue levels derived from UST payments and the oil inspection fee ranged from a low of $26,649,319 to a high of $37,612,959. At the current pace of claim submission and payment, it is anticipated that by mid-2004 the ELTF will be depleted to the range of $25,000,000, at which point the ELTF's administrator is authorized to invoke restrictive procedures under a priority claim and payment process

The IPCA believes that the draft rules are a significant and positive step forward in addressing the above concerns. Subject to the handful of changes listed below, the IPCA fully supports these rulemaking changes. These changes, if adopted, would clarify certain areas of the ELTF, would be consistent with the legislative purpose set forth in the governing statutes, and would provide greater protection to ensure that the ELTF remains a fiscally responsible, viable funding mechanism for our members' UST liabilities for many years to come. (PSRB)

Response: The department thanks the association for its comment and its support of this rulemaking.

Comment: **328 IAC 1-1-8.3:** "Reasonable" means that the **site characterization and** corrective action **are** appropriate and performed only as necessary to meet the cleanup objectives. The term also means that corrective action and site characterization are consistent with 328 IAC 1-3-5(a) through 328 IAC 1-3-5(e).

Change made to be consistent with other provisions in rulemaking and to avoid later confusion over the application of the term "reasonable." (PSRB)

Response: IDEM agrees and this was changed as specified.

Comment: **328 IAC 1-1-10:(a)** "Third party liability" means the damages a tank owner or operator is legally obligated to pay for injury, costs, and damage suffered by a third party as the result of a release. The term includes bodily injury and property damage.

(b) The term does not include the following:

(1) Punitive or exemplary damages.

(2) Claims arising on behalf of or in favor of a claimant, **owner or operator except that in the event of a third party claim being asserted either by an owner of a site with USTs against the operator of the site or by an operator of a site with USTs against the owner of the site, then the owner and operator would only be able to assert a first party claim and would have no greater rights to recover from the Fund than a claimant asserting a first party claim to the Fund.**

(3) Costs that were previously determined ineligible for reimbursement.

The IPCA is willing to accept the proposed language to exclude from the definition of third party liability: (a) claims arising

on behalf of or in favor of a claimant; and (b) costs that were previously determined ineligible for reimbursement. However, for the following reasons, the IPCA cannot accept the proposed change to exclude new owners and operators from third party liability. Instead, to balance the needs of the IPCA, the ELTF and IDEM on this important issue, for future claims the IPCA is willing to accept limiting the types of damages that can be recovered in this situation to that of a first party claim, namely, site characterization and corrective action costs. By placing the owner and operator on the same footing with a first party claimant this would require the payment of a deductible and not allow the recovery of various damages eligible to be recovered in a third party claim, such as lost rent, interest, attorney fees, and diminution in property value due to contamination. This type of limitation would place an owner/operator of a UST site on equal footing with an owner who leases its UST site to an operator. Also, these owner/operator claims would be subject to the same requirements imposed on first party claims, such as UST registration, payment of UST fees, payment of a deductible, timely reporting of a release, etc. Absent such language, the IPCA will have no choice but to oppose IDEM's proposed language to exclude owners and operators from third party liability coverage, for the following reasons. Contrary to the statement in IDEM's comments to the rules, the revisions to third party liability proposed by the Indiana Attorney General to specifically exclude owners and operators is not a clarification, but, rather, a substantial change that is objectionable and will have far-reaching consequences.

First, the proposed language to exclude owners and operators is completely contrary to the position taken by the Financial Assurance Board on this very issue at its June 12, 2003 meeting. In the **Resolution Adopted by the Financial Assurance Board, dated June 12, 2003,** the FAB adopted the following position on this issue:

> **...WHEREAS, Indiana Code §13-23-8-1 and §13-23-9-3, and the regulations or rules thereunder, do not define "third party" or "third parties" to mean any third party except owners and/or operators; and**
>
> **"BE IT HEREBY RESOLVED, to accomplish the Fund's purposes of encouraging environmental cleanups and payment of first party and third party environmental liabilities arising from underground storage tanks, under Ind. Code §13-23-8-1 and §13-23-9-3 and any regulation or rule arising thereunder, "third party" and "third parties" are to be construed broadly to include any and all such third party claims against an owner or operator of an underground storage tank, including an owner or operator of a site with underground storage tanks."**

For ease of review, a copy of the Board's Resolution is attached at **Tab 2.** Given that the FAB is responsible for the Fund and its administration, the IPCA believes that IDEM should reflect the position of its client, the FAB, not the Attorney General, on this issue

Second, excluding the USTs that are owned by the major oil companies, the IPCA members own, operate and/or supply petroleum products to a majority of the remaining USTS in Indiana that are subject to Indiana's Underground Storage Tank program and the ELTF. The IPCA members have hundreds, if not thousands, of UST locations around the State of Indiana where they have entered into contractual arrangements to lease sites to operators who depend on the ELTF to pay for any liabilities arising from the UST operations and related environmental liabilities. As a result, IPCA members and their lessees, dealers and otherwise, routinely face substantial first party and third party liability claims due to UST contamination and will face such claims in the future. Cleanups from leaking USTs typically range in the six figures up to seven-figure range and pose a major liability and expense for UST owners and operators. To suddenly narrow the third party liability coverage available to UST owners would impose a fiscal impact on the regulated community far greater than $500,000. This change would also force UST owners, lessors and lessees throughout the State of Indiana to renegotiate hundred os existing dealer agreements, site and operational leases and other contractual arrangements to address this newly unfunded environmental liability.

Third, since the Fund was enacted in 1988, the IPCA and its members have relied upon the Fund to provide complete first party and third party liability protection and have entered into countless contractual agreements and transactions based on this understanding. Due to the Careful management of these sites throughout the State of Indiana and cooperative efforts of UST owners and operators through the cleanup stage, it is the IPCA's understanding that **only three (3) claims involving a UST owner and operator have ever been submitted to the Fund in its 15-year existence. Morever, of the more than $158,000,000 in claims paid during the 15-year history of the Fund, only one such claim for less than $111,000 has even been paid by the Fund.** Consequently, under the existing language there has been no abuse of the Fund by UST owners and operators on this issue, further supporting the lack of support for changing the existing language. Simply stated, the Fund has **not** experienced a significant number of claims or drain on its resources as a result of the existing language and the ICPA members have continued to rely on this Fund coverage in negotiating dealer agreements, site and operational leases and other transactional documents. To change the status quo now by narrowing the definition of third party to exclude owners and operators would leave a significant, unfunded environmental exposure. This would also be contrary to the state and federal requirements which require a financial assurance mechanism to demonstrate financial responsibility of $1,000,000 per site. (PSRB)

Response: The department appreciates the association proposing compromise language on this issue. The concepts discussed in the draft language have been placed at 328 IAC 1-3-1, Fund Access.

Comment: **328 IAC 1-3-1.3 Cost Effectiveness of Corrective Action**. **1.3(a)(2)(C)** if appropriate, a demonstration that the remediation approach will substantially reduce or eliminate **first party and/or** third party liability.

Change made to clarify that in determining the cost effectiveness of a corrective action, it is appropriate to consider the reduction and/or elimination of both first party and third party liability. (PSRB)

Response: The department agrees that the projected costs of the selected remediation approach should be included in the cost effectiveness analysis. A change was made to 328 IAC 1-3-1.3(b)(1) to include this factor.

Comment: **328 IAC 1-3-1.3(b)(3)** The cost projections under subsection (a)(2)(A) for the remediation approaches and the work to be performed do not exceed the reimbursable costs allowed under **328 IAC 1-3-5(a) and (c) of this rule.**

Change made to be consistent with other provisions in the rulemaking. (PSRB)

Response: IDEM considered this change and added 5(a). IDEM disagrees that reimbursable costs are designated in 328 IAC 1-3-5 (c).

Comment: **328 IAC 1-3-1.3(b)(5)** A demonstration that the remediation approach will substantially reduce or eliminate **first party and** third party liability.

Change made to clarify that in determining the cost effectiveness of a corrective action, it is appropriate to consider the reduction and/or elimination of both first party and third party liability. (PSRB)

Response: The department agrees that the projected costs of the selected remediation approach should be included in the cost effectiveness analysis. A change was made to 328 IAC 1-3-1.3(b)(1) to include this factor.

Comment: **328 IAC 1-3-1.6 Preapproval of Costs**. **(c)** The administrator will send a preapproval letter to the owner or operator stating how much of the cost for each item is preapproved as reasonable and cost effective. This preapproval is not a determination on **fund** eligibility.

Change made to avoid confusion that preapproval of costs does not extend to a determination of a UST owner's eligibility under the fund, which is a separate consideration. (PSRB)

Response: IDEM agrees and this was changed as specified.

Comment: **328 IAC 1-3-3 Eligibility Requirements. (a) (4)** A person who acquires ownership in accordance with subsection (d) and has made timely payment of all past due tank fees, interest and penalties in accordance with subsection (g) for any site characterizations or corrective action related to **the discovery of a release that is reported** after the payment of all past and currently due fees, interest and penalties.

Under the existing regulations, a buyer who submits payment for any past due tank fees, interest and penalties within 30 days of acquiring the site is eligible under the Fund for UST petroleum related claims subsequently discovered and reported to IDEM. Given the subsurface nature of the USTS and the fact that many UST releases occur slowly over long periods of time, the emphasis should be on when the petroleum release is discovered and reported to IDEM, not when first began occurring, which could have been before the date the buyer acquired the site unbeknownst to the seller and buyer. (PSRB)

Response: IDEM agrees and a change was made to refer to a release "first suspected, discovered or confirmed" to this subdivision.

Comment: **328 IAC 1-3-3(d)** IDEM deleted this entire section dealing with a tank owner's right to appeal and resubmit a denied claim yet it does not appear that IDEM replaced or referenced as alternative method for such rights of appeal and resubmission, which need to be provided to UST owners who do not agree with a decision by IDEM/ELTF to deny a claim. (PSRB)

Response: The right to appeal is addressed in 328 IAC 1-5-2. The resubmission of claims process is still being considered by the department because additional costs to the fund are involved.

Comment: **328 IAC 1-3-3(f)** The purchaser is to collect all past due tank fees, interest and penalties from the noncompliant seller and remit to the administrator the full amount of the assessment for the subject underground petroleum storage tank provided by the administrator in accordance with subsection (f) prior to an occurrence **being reported to IDEM**.

Under existing regulations, a buyer who submits payment for any past due tank fees, interest and penalties within 30 days of acquiring the site is eligible under the Fund for UST petroleum related claims subsequently discovered and reported to IDEM. Given the subsurface nature of the USTs and the fact that many UST releases occur slowly over long periods of time, the change is made to properly place the emphasis on when the petroleum release is discovered and reported to IDEM, not when it first began occurring, which would have been before the date the buyer acquired the site. (PSRB)

Response: Subsection (f) is now 328 IAC 1-3-3-(d) . IDEM has changed "occurrence" to "release".

Comment: **328 IAC 1-3-3(g)(2)(A)** For sites that were never registered, or sites for which no tanks were **ever** paid when due, the penalty will be calculated at two thousand dollars ($2,000) under IC 13-23-12-7(a) per petroleum underground storage tanks per year that passes after each year's fee is due.

Change made to clarify that the $2,000 penalty applies to UST owners who never registered or who never paid any fees for any USTs at a site. In addition, both of the tables that follow this provision appear to have incorrect totals. For example, in the first table, three years of missed tank fees for one UST at $2,000 per year equal $6,000, not $12,000. In the second table involving

a UST owner who has made some but not all payments, three years of missed tank fees for one UST at $1,000 per year equals $3,000, not $6,000. (PSRB)

Response: The penalties increase exponentially under this provision. This is meant to meaningfully deter persons who fail to register their tanks or timely pay fees. The rule language is based on IC 13-23-12-7.

Comment: **328 IAC 1-3-4 Amount of Coverage. (a)** After payment of the applicable deductible amount, the fund may pay for reimbursable costs incurred by persons listed in section 1 of this rule **for site characterization and corrective action costs** and third party liability claims as specified in IC 13-23-8-1.

Change made to be consistent with other provisions in the regulations and this rulemaking. (PSRB)

Response: IDEM believes that this change is unnecessary and redundant. Reimbursable costs are specifically described in 328 IAC 1-3-5(a).

Comment: **328 IAC 1-3-5 Costs. (a)(2)(B)** The work performed was consistent with site characterization or an approved **or deemed approved** CAP.

Change made to ensure that both approved and deemed approved CAPS are covered by this provision. (PSRB)

Response: An "approved" CAP does include a "deemed approved" CAP, subject to 328 IAC 1-5-3. No change to the existing language was made.

Comment: **328 IAC 1-3-5(b)(10)** Any other reimbursable costs the administrator finds to be necessary. Payment of a third party liability claim the administrator **approves pursuant to IC §13-23-3.**

Change is made to be consistent with other provisions in the regulations and this rulemaking. (PSRB)

Response: This provision is now at 328 IAC 1-3-5(b)(9). IDEM has made changes to 328 IAC 1-6-2 to clarify that the Attorney General approves requests for payment of third party liability claims. 328 IAC 1-3-5 now deals only with reimbursable costs, not third party liability claims.

Comment: **328 IAC 1-3-5(b)(13)**The cost is consistent with an approved **or deemed approved** CAP where projected costs for the work to be completed under the CAP are reviewed by the **administrator** to determine whether the costs are reimbursable costs.

Change is made to ensure that both approved and deemed approved CAPS are covered by this provision and to be consistent with other references to the administrator rather than commissioner. (PSRB)

Response: The concepts contained in the provision are now part of 328 IAC 1-3-5(a). This subsection now includes, in essence, the language proposed in this comment.

Comment: **328 IAC 1-3-5(c)** The approval of the initial site characterization and the corrective action plan under rules of the solid waste management board at 329 IAC 9 does not necessarily mean that **the actual** costs **incurred** are reimbursable under this rule.

These changes are consistent with other provisions in this rulemaking to ensure that IDEM's approval of an ISC or CAP is limited to these items and does not extend to the actual costs incurred, which are subject to a separate consideration later by the Fund. (PSRB)

Response: IDEM agrees and this was changed as specified.

Comment: **328 IAC 1-3-5(d)(14)(B)** excavation and disposal were shown to be **most cost-effective** remediation option;

Change made to be consistent with the cost-effective language and definition adopted in this rulemaking, which includes a number of considerations. (PSRB)

Response: IDEM agrees and this was changed as specified.

Comment: **328 IAC 1-3-5(d)(14)(C)** the soil removal is part of a CAP approved or deemed approved by the **administrator**.

Change made to be consistent with other references to the administrator rather than commissioner. (PSRB)

Response: IDEM agrees and this was changed as specified.

Comment: **328 IAC 1-4-1 General Procedure** There needs to be a timetable for claims to be classified by IDEM, such as 30 days after submission, so the UST owner and its consultant have a priority determination and an understanding of the likelihood of reimbursement at an early stage of a site investigation and remediation and can plan and budget accordingly. (PSRB)

Response: The department is considering development of a timetable or some other feasible alternative. .

Comment: **328 IAC 1-4-1(1)(b)** Most, if not all, emergency situations require immediate response by the UST owner. As such, these situations do not afford the luxury of time to first submit the necessary documentation to IDEM to obtain <u>preapproval</u> of expenditures and proposed tasks by IDEM and/or the Fund Administrator before undertaking the work and incurring the expenses. Thus, it is unclear why this category is separately listed. Instead, the IPCA suggests that either the word "preapproved" be deleted from the first sentence of (b) or, alternatively, that these claims and expenditures be included in the Category 1 list of claims. (PSRB)

Response: There is no 1-4-1(1)(b). There is a 1-4-1(b) and the word "preapproved" does not appear anywhere in this section..

Comment: **328 IAC 1-4-1(2)** Given the potential third party liability claims that exist and the need to move forward more urgently when off-site soil and groundwater contamination is encountered, the IPCA suggests that these claims be moved up from Category 3 (see (3)(A) and (B)) to Category 2 claims. (PSRB)

Response: IDEM believes that higher prioritization should be given to the most immediate and significant threats to the environment. This is a requirement of IC 13-23-8. However, third party liability is categorized as the site is categorized in the current draft rule.

Comment: **328 IAC 1-4-3 Reclassification of Releases**. **(a)(3)** If the administrator approves placement in a **different** category, the applicant may seek reimbursement under the new category for any costs incurred subsequent to the placement.

Change is made to allow the administrator flexibility to reclassify a claim to either a higher or lower category. For example, a claim may initially be classified as a low priority claim, such as Category 3, but then further investigation reveals high levels of free product or significant off-site contamination that would warrant a higher priority claim classification. (PSRB)

Response: IDEM agrees and will change to word "lower" to "different".

Comment: **328 IAC 1-4-4 Monthly Reimbursement. (a)** The total amount reimbursed from the fund **each month** must not exceed ten percent (10%) of the fund balance based on the average fund balance of the previous fiscal quarter . . .

Change made to clarify that the limitation on the amount reimbursed is on a monthly basis.(PSRB)

Response: IDEM agrees and the language was changed.

Comment: **328 IAC 1-5-1 Applications for payment of reimbursable costs. (b)** The application shall contain the following statement, which shall be signed and attested by the person applying to the fund and the owner **or** operator: "I swear or affirm . . .

Given that the owner and operator are often two distinct corporate entities, only one of which has the USTs registered in its name at the time a claim is submitted, the sworn statement should be signed by the entity responsible for the UST registration, UST payment and claim for reimbursement. (PSRB)

Response: 328 IAC 1-5-1(b) has been revised to clarify this issue.

Comment: On behalf of the Indiana Petroleum Council, I would like to submit the following comments regarding the proposed amendments to rules concerning the Excess Liability Trust Fund. The Council is a trade association representing oil suppliers and refiners that have assets in the state of Indiana. Some of our member companies also own and operate underground storage tanks in the state, and thus, are very concerned with the solvency of the Excess Liability Trust Fund (ELTF) and the continued success of Indiana's UST program. A healthy fund balance in the Excess Liability Trust fund is a major priority for the Council and its members. Unlike some other states that have seen their fund run dry, Indiana has established a long history of support for the ELTF by the industry, legislators and regulators alike. This partnership is critical in order for the ELTF to continue to be a viable entity in the future. (IPC)

Response: The department thanks the Council for its support. IDEM agrees that the viability of the fund must continue to be supported by all stakeholders.

Comment: First, I would like to compliment IDEM staff on their hard work conducting the numerous public work group meetings regarding the proposed amendments. The Council applauds the efforts by the department to take the necessary steps to ensure that the fund is used for its intended purpose and claims made against the fund are cost effective and reasonable in nature. Also, with the prospect that the fund may for the first time dip below the $25 million mark, it is important to clarify the prioritization scheme for claims so that those sites posing the most significant threat are given priority in payment. (IPC)

Response: IDEM believes that the proposed prioritization scheme presented in 328 IAC 1-4 is much clearer and more specific than the current rule language. Sites posing the most immediate and significant threats to the environment will receive top priority.

Comment: The Council supports several of the definitional changes proposed by the department, which we believe provide some necessary clarity to the rules. For example, the Council believes the changes in the definition of "substantial compliance" in 328 IAC 1-1-9 are positive. With more and more pressure on the fund balance, the Council does not believe it is appropriate to reward tank owners and operators who do not comply with existing regulatory or statutory requirements and deadlines over those who comply with all applicable requirements. The language proposed by the department is a positive addition to the rule and clarifies the existing, somewhat vague, current language. (IPC)

Response: IDEM thanks the Council for its support of these changes to definition of "substantial compliance".

Comment: The Council also supports the department's proposed changes to the definition of "reasonable" in 328 IAC 1-1-8.3. The Council, however, is concerned about the manner in which the new definition may be applied to work already submitted in a claim in the past that may have been deemed reasonable at the time but is now no longer deemed reasonable. The Council asks that the Department use caution in applying this new definition retroactively, which could potentially have an adverse effect on site that where the work is already in progress and a CAP has already been approved. (IPC)

Response: It is not the department's intention to deny reimbursement for costs for work that was previously approved as reasonable. There may be circumstances, however, where IDEM denies claims for work previously performed that IDEM did not

review.

Comment: In addition, the Council supports the Department's efforts to further define "cost effectiveness of corrective action," which we believe is an important step toward keeping a check on clean up costs that will, in turn, help protect the fund balance. However, this new step additional step for the fund administrator should not result in adding any unnecessary delays to the claims review process. In addition, the Council requests that the Department consider that in certain cases where a third party may be impacted the third party may request that the impacted property be cleaned up to a more stringent clean up criteria. A third party may have a future plan for a parcel currently zoned commercial that involves more than commercial use. Third party claims should be granted an exception in this case and reimbursement should be allowed for corrective action that goes further than what might be acceptable for the current use if requested by a third party. (IPC)

Response: The department does not believe there will be unnecessary delays. Generally the fund cannot pay for higher cleanup levels for a speculative future use. Please see the current draft language at 328 IAC 1-3-5(d)(13).

Comment: The Department has added a new definition of "third party" in the proposed rule, which excludes an owner or operator. The Council requests that IDEM add language to the proposed draft that would allow a property owner who did not own or operate USTs at a particular site to be allowed eligibility to the fund in the same manner they would if they owned or operated tanks at the site. This would protect an innocent landowner who leased his property to another tank owner/operator, but did not cause the release. In essence, this would allow for multiple first party claims at a site and would not leave a property owner stranded with a release he did not cause at a site that had been ELTF eligible, but with no chance of reimbursement from the fund. As a member of the Financial Assurance Board, I also believe this approach to be consistent with the intent of the FAB when it passed a resolution on this matter last June. (IPC)

Response: IDEM agrees that UST owners, UST operators, and owners of property containing USTs, should be able to access the fund if they meet the eligibility requirements. The department also agrees that more one or more of these parties should be able to access the fund. Based on these comments and comments received from others, IDEM modified 328 IAC 1-3-1 Fund access, to further clarify and ensure that this may occur.

Comment: **328 IAC 1-1-8.3 "Reasonable" defined:** Lee & Ryan believes that this rule should include a specific reference to the requirements under 329 IAC 9-4, 9-5 and 9-6. As all corrective action, including site characterization, must meet these requirements, any costs associated with the work required by these rules must be presumed to be reasonable. In addition, as 328 IAC 1-3-5 refers only to the costs of corrective action, the rule needs to be clarified. Lee & Ryan suggests the following changes to the proposed rule language:

Sec. 8.3. "Reasonable" means that the *corrective* action is appropriate and performed as necessary to meet the cleanup objectives for the site *and the requirements under 329 IAC 9 and other applicable federal and state regulations and local ordinances.* The term also means that the *costs associated* action and site characterization are consistent with 328 IAC 1-3-5(b) through IAC 1-3-5(e). (L & R)

Response: IDEM agrees with most of the changes proposed in this comment and has made changes to the definition accordingly.

Comment: **328 IAC 1-1-9 "*Substantial compliance*" defined**

The reference to the "spill reporting rule" is somewhat vague and references to the actual rules should be included. Also, IDEM had originally proposed allowing a grace period of 30 days rather than 7. For purposes of determining ELTF eligibility, 30 days is more reasonable. In addition, "threatens to harm" is very vague. In theory, any release of petroleum to the environment presents a "threat". For purposes of ELTF reimbursement, Lee & Ryan believes that actual harm to the environment should be shown in order to deny reimbursement to an otherwise eligible owner or operator. (If IDEM chooses to punish an owner or operator for failing to report in a timely manner, it has enforcement authority.) Lee & Ryan suggests the following changes to subsection (b), rule language.

(b)An owner or operator is not in substantial compliance if the release:

(1)has not been reported, under ~~the spill reporting rule~~ *either 3,2. LAC 9-4-1 or327 L4C 2-6.1* as applicable at the time of the release, within ~~seven (7)~~ *thirty (30)* days of the discovery of the release; or

(2) harms ~~or threatens to harm~~ public health or the environment and was not timely reported under ~~the spill reporting rule~~ *either 329 L4C 9-4-1 0r 327 IAC 2-6.1 as* applicable at the time of the release. (L & R)

Response: Seven days is sufficient time for "substantial compliance" when a spill is required to be reported within twenty-four (24) hours under the law.

Comment: **3281AC 1-2-1 Applicability.** The date for determining the *applicable* cost should be the date the work is performed, not the date of the invoice, regardless of whether *the work* is performed by a subcontractor or the *owner or* operator. If the work is conducted over a period of days *and overlaps* the effective date of the rules, the date for determining which cost should be applied should be the date the work began.

Lee & Ryan suggests *that* the language remain essentially the same:

(2) The applicable cost range or amount of the reimbursable cost, as set forth in 328 IAC 1-3-5, shall be determined as of the date *the expense was initially incurred by the applicant to the fund.* (L & R)

Response: The applicable cost is based on the date the cost was incurred. If it is a cost incurred by the owner, operator or assignee, it is the actual date the work is performed or completed. However, if it is a cost for which subcontractor performs work for a contractor in an assignment situation or if a contractor performs work for an owner or operator, that cost is not incurred until an invoice is generated.

Comment: **328 IAC 1-3-1.3 Cost Effectiveness of Corrective Action.** The proposed language in 328 IAC 1-3-1.3(a) states *that,* "the Administrator will not make a determination on cost effectiveness before a CAP is approved." It is unclear why the Administrator will not make this decision at this point in time. Delaying this determination only serves to delay the corrective action as the owner or operator must, upon receiving CAP approval, resubmit all of this *information* in order to get a determination regarding cost effectiveness. Lee & Ryan suggests deleting this language. (L & R)

Response: IDEM agrees that the department should take whatever steps possible to ensure timely approval of work to be performed. However, before the work can be evaluated for cost effectiveness, the department must first determine that the proposed CAP is appropriate or will indeed work. As a practical matter, these approvals should occur simultaneously. IDEM does not expect significant delays or resubmittals as a result of this process. Both CAPS and budgets should be submitted together and will be reviewed concurrently.

Comment: **328 IAC 1-3-1.6 Preapproval of costs.** It is important that IDEM provide guidance as to how this provision well be implemented. It is likely that this procedure will be used frequently. There is a strong possibility that this could slow down the remediation of sites if IDEM does not have a process in place for implementing this. It should be clear that preapproval means that the costs will be deemed reimbursable under 328 IAC 1-3-5(a). It is important *that* the regulated community know that even through CAP approval does not "necessarily mean that costs are reimbursable costs under the rule " (328 IAC 1-3-5(c)), that there is a mechanism by which the owner/operator can get a definitive response from IDEM regarding which costs will be reimbursed. It is equally important that this response be timely. Lee & Ryan suggests the following language:

328 IAC 1-3-1.6 Preapproval of reimbursable costs

Sec. 1.6 (a) Persons described in section 1 of this rule may submit to the administrator a request for a preapproval of reimbursable costs for work to be performed under the approved CAP. The administrator's preapproval will be based on the following:

(1) A determination of cost effectiveness under section 1.3 of this rule.

(2) Costs are reasonable.

(b) Costs preapproved under this section shall be deemed to be reimbursable under 328 IAC 1-3-5(a).

~~(b)~~ (c) The administrator may ask for additional information to substantiate the projected work and projected costs.

~~(c)~~ (d) The administrator will send a preapproval letter the owner or operator stating how much of the cost for each item of work is preapproved as reasonable and cost effective. This preapproval is not a determination of eligibility.

(e) The administrator shall review any requests for preapproval within sixth (60) days of receipt. (L & R)

Response: Further discussions with the workgroup may be necessary to finalize changes to this section.

Comment: 328 IAC 1-3-5(a)(12) Mark up. As the primary contractor on an ELTF project, Lee and Ryan incurs various costs related to its business as a whole, and not specifically chargeable to the project in particular. These expenses include: administrative salaries, insurance costs, office rent, utilities and taxes, telephone communications, office equipment and supplies, health care benefits for employees and other such customary corporate expenses. As the company adds additional projects, the overhead costs rise as well. The company's revenue stream must be sufficient to cover these expenses. This is true whether the environmental work, such as drilling, sample analysis or system operation and maintenance, is handled internally or subcontracted to other parties. In additional the general overhead costs, the costs to obtain liability insurance, prepare ELTF claims, purchase equipment, handle data processing needs, process invoices and bills and other such administrative responsibilities must be performed related to the ELTF project, but aren't reimbursed. The projects' net profit margin needs to be sufficient to cover these expenses. A 15% mark-up allows the corporation to recover these costs with very minimal additional profit. Since the cost will not decrease as the mark-up is reduced, reducing the mark-up on subcontractor revenues to 10% will result in the consulting firms failing to recover their overhead costs. If consultants cannot make a profit from ELTF work, they will be reluctant to take on such projects. This may result in a delay in cleanups. Lee and Ryan suggest that the mark-up remain 15%. (L & R)

Response: IDEM disagrees that the markup should remain at 15%. After review of several other state fund programs, about 90% allow a 10% markup. Often, the costs for larger purchases such as building a corrective action system are incurred by the subcontractor or owner/operator and not the contractor or assignee. In addition, consultants make profits in other ways, particularly with labor rates. Finally, when a Lee & Ryan representative asked if any other consultant had an issue with this change at the January 29, 2004 stakeholder meeting, only one contractor out of about 20 supported this position. One contractor said that 10% is acceptable. The department believes that contractors can still make a fair profit with a lower markup.

Comment: 328 IAC 1-3-5(c). There is still a great deal of uncertainty regarding what cost would not be reimbursable under an approved CAP.. IDEM has provided no guidance on this issue. At the very least, a non-rule policy document must be drafted to provide some direction to the regulated community as to which costs may be denied under this provision. In addition, the rule should

contain a requirement that IDEM notify an owner or operator as soon as they have information that the owner or operator intends to incur costs which are not reimbursable. This notification should include the reasons why IDEM made this determination. Lee and Ryan does not believe it is in our clients' best interest to incur costs which will not be reimbursed. If IDEM cannot provide some standards through which the regulated community can determine if the costs they intend to incur are reimbursable, then this provision should be stricken. Lee and Ryan suggests the following language:

(c) The approval of the initial site characterization and the corrective action plan under rules of the solid waste management board at 329 IAC 9 does not necessarily means that costs are reimbursable under this rule except as follows. The following costs will be deemed reimbursable:

(1) Costs preapproved under 329 IAC 1-3-1.6.

(2) Costs incurred for work requested by the administrator. (L & R)

Response: IDEM believes that the current draft rule language adequately addresses this comment. However, IDEM is willing to further discuss the possibility of developing additional guidance at a future date.

Comment: **328 IAC 1-3-5(d)(2) Costs incurred more than twenty-four (24) hours prior to the date and time the suspected or the confirmed release has been reported under the spill reporting rule in effect at the time of the release.**

Discussions held at the external workgroups revealed that the purposed behind this rule is to discourage owners or operators from initiating cleanups for business reasons, such as the sale of the property. The reason why an owner or operator begins an investigation is not relevant to its eligibility for reimbursement. There is a certain amount of information that should be collected prior to initiating actual site work. This information must be included in the site characterization report pursuant to 329 IAC 9. Whether the information is obtained before a release is reported or after is irrelevant. Lee and Ryan suggests deleting this provision. (L & R)

Response: Fund access for work performed cannot be obtained until a release is suspected, discovered or confirmed. That is verified by a release report to the department. IDEM will not reimburse costs incurred prior to that date with the exception noted which acknowledges the reporting requirements of 24 hours.

Comment: 328 IAC 1-3-5(d)(6) Labor Costs. This provision references "the cost of labor and equipment purchases other than those costs routinely required to implement a corrective action plan." No examples of such labor costs are given. For Clarification purposes, examples should be given. (L & R)

Response: There are no references to "labor" in the current draft rule, this was deleted.

Comment: 328 IAC 1-3-5(d)(13). Use of Industrial Levels. Lee and Ryan agrees with IDEM that the use of industrial clean-up levels may be appropriate on the majority of ELTF sites. The following situation should also be included as an exception to this rule: (1) private drinking water wells are contaminated and (2) the properties down gradient are residential. Lee and Ryan suggest the following language:

(13) Any costs for remediation of contamination not shown to be above ~~the concentrations listed in the Indiana Department of Environmental Management Underground Storage Tank Guidance Manual (1994), rules of the solid waste management board at 329 IAC 9 and~~ the RISC **industrial cleanup** standards **with the following exceptions:**

(A) Groundwater contamination affecting a public or private drinking water well on-site or off-site.

(B) Contamination at concentrations exceeding RISC residential cleanup standards off-site, not including roadways.

(C) Contamination at concentrations exceeding RISC residential cleanup standards on-site where the properties immediately down gradient of the site are residential properties.

(D) Contamination at concentrations exceeding RISC residential cleanup standards on-site where the future land use will be residential. (L & R)

Response: IDEM agrees with adding items (A) and (B). IDEM disagrees with items (C) and (D). The RISC program is specifically designed to ensure that contaminants are not migrating onto neighboring properties beyond a perimeter of compliance above acceptable levels such as residential levels. If there is no likelihood of contamination migrating to a neighboring property no matter what the land use is, there is no justification for requiring stricter cleanup objectives. The ELTF was not created for property improvements or development.

Comment: 328 IAC 1-3-5(d)(14)(B) Excavation. In 328 IAC 1-3-1.3, IDEM has proposed adding a definition of "cost effective" and requires that the proposed corrective action be cost effective. 328 IAC 1-3-5(d)(14)(B) proposes to exempt excavation from this requirement. There is no reason why excavation and disposal of contaminated soil should not meet the same criteria as any other corrective action. Lee and Ryan suggests the following language for subparagraph (B):

(B) excavation and disposal was shown to be the most effective pursuant to 328 IAC 1-3-1.3 **~~least costly and quickest~~** remediation option; and (L & R)

Response: IDEM agrees with the reasoning of the comment and this provision has been revised. The phrase "cost effective" has been added to the provision. However, it should be noted that 328 IAC 1-3-1.3 is not a definition, but delineates an analysis for cost effective of remediation alternatives. The phrase "cost effective" in 328 IAC 1-3-5(d)(14)(B) should be given its plain and ordinary meaning.

Comment: 328 IAC 1-3-5(e) Drilling costs. Per foot rate for use of hollow stem auger vs. per day for use of direct push:

Lee and Ryan does not agree that there should be a separate rate for soil borings that depends upon the method used to install the soil borings. Typically, the use of a direct push is more time efficient and generates less waste. Allowing a per foot rate for the auger seems to be rewarding the use of a less efficient method. In addition, given the rate for the direct push is listed under equipment rental rates, is it now acceptable for the drilling subcontractor to charge hourly labor rates for the installation of soil borings in addition to the daily equipment rental? Lee and Ryan is also concerned about IDEM's policy in deciding which rate to use, either the half-day or full day rate. The rule does note provide any guidance on this matter. In particular, Lee and Ryan would like to point out that, given certain geological conditions, it is possible to spend a significant amount of time working on a site using the direct push and completing on a small number of borings. If the appropriate rate is dependent upon the number of feet frilled in one day, then Lee and Ryan would request that IDEM take the difficulty of drilling in account also. (L & R)

Response: IDEM agrees and has added a statement was added to the rule that says "Direct push technology must be used when it is more appropriate to the site and costs less than other drill methods."

Comment: The costs for an on-site delineation should be reimbursed upon IDEM's approval of the on-site characterization. Frequently, completing the site characterization is difficult if off-site issues arise and the owner or operator must seek access to the off-site properties. This may take a significant amount of time. If the owner or operator were reimbursed for the on-site work, this would ease the financial burden on the owner or operator. (L & R)

Response: The current draft rule describes how costs are reimbursed. Some level of detail is beyond the scope of the rule.

Comment: IDEM required that a licensed professional geologist, registered professional engineer, certified hazardous materials manager or professional soil scientist sign the technical reports, such as the Corrective Action Plan or Initial Site Characterization Report. However, there is no requirement that the IDEM staff reviewing these documents have the same qualifications. It would seem logical that if such qualifications are necessary to write the reports, then the same qualification are necessary to adequately review the reports. (L & R)

Response: These rule regulate persons applying to the excess liability trust fund for repayment of cleanup costs at underground storage tank sites. It also lays out the penalties for non-payment of underground storage tank fees. The rule outlines a prioritization scheme for when the fund payments must be prioritized. This rule implements the statute at IC 13-23-8 and IC 13-23-9. There is no statutory authority for only licensed professional geologists, registered professional engineers, certified hazardous materials managers or professional soil scientists to review technical reports even though many of the department staff do have those credentials.